undoubtedly appear to be circumstances of the transaction which resulted in the deceased's death, and the deceased's statements to that effect become relevant under the express provisions of section 32 (1).

We have been referred to the decision of the Johore Court of Appeal (Sproule and Burton, JJ.) in *Haji Salleh & anor.* v. *P.P.* (1931—2) F.M.S. L.R. p. 229, where a statement by the deceased made a month before his death to the effect that he was afraid that one of the accused might kill him, was held to be inadmissible. This decision may be justified on the same ground that we consider the statement of the 5th March inadmissible in this case, namely that it is too remote, and cannot properly be regarded as one of the circumstances of the transaction resulting in the death of the deceased. But we cannot agree with the dicta appearing in the judgment to the effect that a statement under section 32 (1) of the Evidence Ordinance is a dying declaration and must be confined to the injury and immediate circumstances of the cause of death, since section 32 (1) is not restricted in any such way. If the evidence that may be given under section 32 (i) is to be so confined it would be equivalent to adding to the sub-section a proviso to the following effect: "Provided that no such statement shall be admissible unless the deceased has already received the injury from which he subsequently died." That would be rewriting the subsection by introducing a qualification upon which the legislature is silent. (See *per* Lord Hewart L.C.J. in *Chaiutin* v. *Whitehead* 1938 A.E.R. Vol. 1, K.B.D. p. 159 at p. 162).

Under the English law a statement by a deceased person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is only admissible, (a) where the person making such statement was in immediate expectation of death, and (b) in trials for homicide. Under section 32 (i) these restrictions have been abolished, and accordingly we do not think that any useful purpose will be served by considering the attempts of English Judges to admit, as part of the *res gestae*, statements made previous to the receipt of any injury by the deceased, such statements being clearly inadmissible as dying declarations. In any case the decisions on the subject appear to be irreconcilable, and afford no useful guide. (See for example, *Wainwright's* case, 13 Cox p. 171, and *Buckley's* case, at p. 293 of the same report). It appears to us that where the provisions of the statute law of the Colony are materially different from the corresponding English law on the subject, it is the duty of the Courts to interpret the local provisions as they stand and according to their natural meaning, and without reference to the very different rules which govern the law on the subject in England. As Lord Macmillan said in the case of *Commissioner of Stamps S.S.* v. *Oei Tjong Swan*, 1933 A.C. p. 378 at p. 387, "the best and safest guide to the intention of all legislation is afforded by what the legislature has itself said."

We would only remark that in referring to this statement in his summing up the learned trial Judge for some reason appeared to consider that part of the statement, namely that the deceased was going out with the accused, might be admissible, but directed the jury to reject the rest of the statement. He then warned them that they must also be satisfied that the statement was made at all. In our view the whole of the statement was admissible, but the accused was certainly not prejudiced by the manner in which the evidence was put to the jury in the summing up.

We agree, therefore, that this appeal should be dismissed.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 16, 1938.

DATO KAMAT BIN HAJI SULEIMAN v. SAPAIN BINTE MOHAMED ZIN.

[MALACCA SUIT No. 67 of 1937]

Malacca Land Customary Rights Ordinance —Naning Custom.

When customary land is held under the Malacca Land Customary Rights Ordinance no lien or equitable charge can be created by deposit of the extract from the mukim register. The customary land holder can only charge his interest in the land in the manner provided by ss. 21 to 29 of the Ordinance.

Query. When land is held by the customary land holder under the Naning custom whether the land holder can give a charge to any person other than the female of the same suku.

ACTION.

Massey for the plaintiff.

Salt for the defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

HORNE, J.—The plaintiff claims damages for breach of an agreement in writing. It is admitted by Mr. Salt that if the agreement is enforceable or a severable part of it is enforceable then art. 95 of the Limitation Ordinance applies and consequently the plaintiff is not time-barred.

The agreement is dated the 12th May, 1932, and the writ was issued on the 17th October 1937. The defendant is a customary landholder of Pesaka land and I infer from the reference to 5 plots in the agreement, the copy of the survey plan and Mr. Cobden-Ramsay's evidence that, in 1932, there had been a survey of a village layout, which covered the land in respect of which she is the holder, but there had been apparently no recourse to s. 10 of Chapter 125, under which she might have applied for a grant or a lease. She had previously arranged with a Chinese contractor to build a brick building and, the balance of his price $1,775 being unpaid, she was sued for the debt and the land was seized in execution. The land wholly or in part had ceased to be agricultural land in fact and evidently the defendant did not wish it to be sold. If it were sold at that time it could under Adat Naning only be sold to another female of the same suku as the defendant. The defendant may have been hoping eventually to obtain a lease in substitution of her rights as a customary landholder, but as the waris have an interest also in the land, there is a possibility that the surrender of this Pesaka land would be met by the Collector allotting other agricultural land on Naning tenure wholly or partly in satisfaction of the surrender.

The position of the waris under adat naning is rather peculiar. It has been stated they are the relatives of the holder. The meaning given to the word 'waris' in Wilkinson's Malay Dictionary is 'heir' and 'inheritor.' The Court interpreter gives me 'relatives' or 'descendants.' Wilkinson's Dictionary also gives a meaning limited to parts of Sumatra as 'tribal officials who control the law of succession.' Whether in the part of Malacca where the land in question is situate the descendants from the common ancestor have developed into a body of tribal officials is not clear to me, but that the waris of the defendants have a recognised position under the custom seems clear from the case of *Muna binte Haji Badar* v. *Isam binte Mohamed Syed*, (1935) S.S.L.R. 366; 5 M.L.J. 42. The descendants or waris are not eligible, however, to hold the land under the custom because succession is only to females in the suku. The capacity of such female holder to do any of the acts permitted to a customary landholder under the Ordinance (Cap. 125) is limited by the rights of the Waris to control the acts of the female holder. I think I must accept the evidence given by Mr. Cobden Ramsay and Haji Abdul Rahman that the holder has not under the custom an unlimited right of disposal; and, as a sale can only take place within the suku, that part of the Ordinance giving a customary landholder capacity to charge his interest in the manner therein provided is, in the case of land under Naning custom, practically a dead letter. The fact that there has been no charge registered during the last 13 years strongly supports this view.

The case above mentioned has been cited to show that land of this particular customary tenure was in fact charged in 1924. But although the judgment of Burton J. (Ag. C.J.) states that the holder charged it to a chetty and defaulted, the Resident Councillor's judgment states that the land was seized for a debt due on a promissory note and sold by public auction. Whichever is correct it seems obvious that this case was unusual and arose because of the irregularity of selling outside the suku of the former female holder. It is an attempt to set right an admitted mistake at the forced sale and it is not clear how that forced sale arose. The case is however an authority for saying that the Court in such a case will endeavour to put such a mistake right upon terms which are in accordance with the custom.

At the time the $1,775 was borrowed from the plaintiff to pay out the execution creditor, both the plaintiff and the defendant were apparently under the impression that a mortgage under Chapter 125, which is really a charge, could be given by the defendant to the plaintiff. But no charge was created and registered, it being considered by the then Collector, Mr. Cobden-Ramsay that the limited right of disposal possessed by the defendant under the custom prevented her from giving a charge to any person other than a female of the same Suku. Certainly a charge seems inappropriate as it can only be enforced by a sale or transfer to another female of the same suku. But whether the Collector's view of the custom is correct or not is not for me to decide. Section 22 (i) of the Ordinance empowers the Collector to register the mortgage "on being satisfied that the mortgagee is entitled to have his mortgage registered. Apparently the refusal to register the mortgage could be questioned under s. 30, sub-s. 4 as a default in making an entry in the Register or at least could be brought before this Court by a more expensive proceeding. But the object of the Ordinance is to give the Collector strict control.

A month later the parties entered into the agreement sued upon, which was drawn up by a petition writer in Tampin.

By this document the defendant agreed in consideration of $1,800 lent to her to repay the said sum within ten months by selling her customary holdings, i.e. the one with the building on which had been surveyed for village layout and another one that she also held under Naning tenure. According to the custom she may transfer her holdings with the consent of the Waris to another female in her own suku. In my

opinion, therefore, she undertook by this agreement to obtain the necessary consent and to find a buyer within ten months.

The agreement then provided that in the event of failure of such sale, I paraphrase the petition writer and state what I consider the intention of the parties—she was to transfer the subdivision or subdivisions with the brick building on it. That would not be an impossible or an illegal undertaking if s. 10 of the Ordinance were invoked and if subsequently she received a grant or a lease in respect of the subdivision. But is of course impossible so long as the land remains Pesaka. Failing this transfer, the defendant, the agreement goes on, "shall be held responsible for all damages incurred by the lender" i.e. the plaintiff. The remainder of the agreement is not worth anything. In so far as it attempts to create a lien by deposit of the extracts from the Mukim Register, or purports to be an agreement to give a charge i.e. a mortgage under Chapter 125 it is illegal. I agree that where there is a statutory grant of land the title to which is registered under a system of registration of title as in the F.M.S. an equitable charge may be created by deposit of the certificate of titles. But the object of this Ordinance is to record the customary right of holders of agricultural land held under customary tenure and the capacity to transfer or mortgage the holder's interest in the land is strictly limited. By s. 4 of the ordinance Conveyancing Law of the Colony is not to apply and if the law does not apply equity which follows the law cannot apply. Section 3 limits the class of holders to domiciled Malays. Under s. 12 transfers and mortgages have to be effected and registered in accordance with the Ordinance and not otherwise. Sections 21 to 28 provide the manner in which the statutory mortgage is to be effected and enforced and s. 29 renders invalid a sale or mortgage not in accordance with the Ordinance. The effect of these sections appears to me to preclude any lien or equitable charge being created by deposit of the Extract from Mukim Register. A customary landholder can only charge his interest in the land in accordance with the Ordinance and in this case, as Naning custom has to be applied and interest of the landholder is even more limited than that described in s. 6, even a mortgage effected in accordance with the Ordinance is hardly a practical proposition.

As there is, however, in this agreement a clear personal undertaking to perform certain acts: obtain a sale within the Suku or in default of obtaining a sale by transfer within the Suku to obtain a transfer of the subdivision or subdivisions with the building to the plaintiff and the failure to do either is admitted, damages necessarily flow from the breach of the undertakings. What are the damages? Certainly the $1,800 paid, but whether the plaintiff is entitled to interest upon this sum for the whole period is doubtful. He went into the transaction with his eyes open as to the defendant's limited powers of transfer and offers no explanation as to the delay in bringing the suit. He also had a promissory note from the defendant which he permitted to become time-barred. The defendant however has had the use of the money. I think it just in the circumstances to add a nominal sum for interest and give judgment for the plaintiff for $2,500 and costs of the suit.

As for the counterclaim; the defendant went into this transaction on equal terms with the plaintiff and she is not entitled to the declarations claimed. She has not proved any damage or loss consequent upon a demand being made for the delivery up to her of the Extracts from the Mukim Register. Even if these extracts had been in the defendant's possession during the past 5 years, it would have been difficult for her to have made any effective disposition of her holdings; because it is evident from the entry in the Register referring to a file in the Collector's office that, rightly or wrongly, such prospective dispositions were to be, if not prevented, at least very carefully supervised. It is also possible that the defendant may have to submit to a forfeiture under the Ordinance. On the whole, therefore, I consider that the Extracts had better be handed to the Collector by the plaintiff and I order accordingly.

The counterclaim is dismissed with costs.

Order accordingly.

Solicitor for the plaintiff—*D. E. T. Jayaswal.*

Solicitors for the defendant—

W. H. Salt & Co.

[ORIGINAL CIVIL JURISDICTION]

HORNE, J.

March 17, 1938.

H. AHMAD v. MUTHU PALANIAPPA CHETTIAR.

[MALACCA SUIT No. 65 of 1937]

Architects Ordinance (Cap. 64)—Scale of Fees—Abandoned Work.

The scale of fees fixed by the Board of Architects under s. 3, sub-s. 1(b) of the Architects Ordinance was approved by the Governor in Council with effect on the 1st November 1932 and was duly gazetted.

Held, that in the event of a project being abandoned, by virtue of clause 9 sub-clause (b), two-thirds of the percentages mentioned in clause 2 is the whole fee payable; and this percentage is not liable to be increased under clause 4 in the case of alterations and additions to existing buildings; nor is it liable to be increased under clause 7 in the case of reinforced or structural steel building.